

Dispute Resolution Alert

June 2011

Mandatory obligations to take genuine steps to resolve disputes before commencing proceedings

The Commonwealth Parliament recently enacted legislation to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted in federal courts.

The Victorian Parliament has also enacted legislation that imposes pre-litigation requirements on persons involved in a civil dispute prior to commencing proceedings.

Failure to comply with the relevant legislation will not invalidate any proceedings commenced. However, the court may take the failure to comply with the pre-litigation requirements into account when awarding costs associated with the proceedings.

Commonwealth Legislation

The Commonwealth *Civil Dispute Resolution Act 2011* (**CDR Act**) received assent on 12 April 2011. Part 1 of the CDR Act commenced on that date and Parts 2 to 5 will commence on a day to be proclaimed.

The object of the CDR Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted in federal courts.

The CDR Act requires:

- A person who institutes civil proceedings to file a 'genuine steps' statement at the time of filing the application.
- A person against whom proceedings are instituted to also file a 'genuine steps' statement.

Under the CDR Act, a person takes 'genuine steps' if the steps taken constitute a sincere and genuine attempt to resolve the dispute.

Some examples of 'genuine steps' include:

- Notifying the other party of the issues in dispute and offering to discuss them with a view to resolving the dispute.
- Responding to any such notification.
- Providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved.
- Considering possible resolution through alternative dispute resolution processes.
- Attempting to negotiate with the other party with a view to resolving some or all of the issues in dispute.

The court may take into account the 'genuine steps' taken by a party in exercising the court's discretion and powers, including the discretion to award costs. Obviously, the intention is that, if such steps are not taken, then an adverse cost order could be made against the party not complying, irrespective of the outcome of the proceedings.

The CDR Act excludes certain kinds of civil proceedings from the requirement to lodge a 'genuine steps' statement, including proceedings:

- That relate to a decision of certain Tribunals.
- In relation to the exercise of a power to issue a warrant.
- To enforce an enforceable undertaking.

When a person who has an obligation to file a 'genuine steps' statement has a lawyer acting for them, the CDR Act requires the lawyer to advise the person of that requirement and to assist the person to comply with the requirement.

Victorian Legislation

The *Victorian Civil Procedure Act 2010 (CP Act)* commenced on 1 January 2011.

Amongst other things, the CP Act provides for the facilitation of the resolution of disputes before civil proceedings are commenced. The Act applies to civil proceedings in the Supreme, County and Magistrates Courts but not VCAT.

The CP Act establishes an '*overarching obligation*' on a person who is a party to civil proceedings, a lawyer and the law practice acting for a party and any person who provides financial assistance or other assistance to any party (in so far as that person exercises control or influence over the proceedings).

The '*overarching obligation*' is to use reasonable endeavours to:

- Resolve the dispute by agreement, including by appropriate dispute resolution.
- Clarify and narrow the issues in dispute.

The '*overarching obligations*' apply to any civil proceeding in a court, including:

- Interlocutory applications or interlocutory proceedings.
- Appeals from an order or a judgment in a civil proceeding.
- Appropriate dispute resolution undertaken in relation to a civil proceeding.

Compliance with an '*overarching obligation*' will include:

- The exchange of appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute.
- The consideration of options for resolving the dispute without the need for civil proceedings in a court, including, but not limited to, resolution through genuine and reasonable negotiations or appropriate dispute resolution.

Each person involved in a civil dispute must not unreasonably refuse to participate in genuine and reasonable negotiations or appropriate dispute resolution.

The court may take into account any contravention of the '*overarching obligation*' by a party in exercising the court's discretion and powers, including the discretion to award costs.

Each party to a civil proceeding, or that party's legal practitioner, must certify whether the pre-litigation requirements have been complied with. If the pre-litigation requirements have not been undertaken by the

certifying party, the pre-litigation requirements compliance certification must set out briefly the reasons why those requirements have not been undertaken.

Other States

New South Wales

In April 2009, the NSW Department of Justice and Attorney General issued a Discussion Paper raising the introduction of pre-action protocols. Options were canvassed in relation to the incorporation of pre-action protocols into guidelines that a court could take into account when asked to determine a civil dispute. Serious failure to comply with the guidelines may result in adverse cost orders.

A Draft Recommendations Report followed in September 2009. The draft recommendations recommended people in a civil dispute take all reasonable steps to resolve the dispute without litigation.

In December 2010, the NSW Parliament enacted the *Courts and Crimes Legislation Further Amendment Act 2010 (NSW)* which, amongst other things, inserted a new Part 2A, steps to be taken before the commencement of proceedings, into the *Civil Procedure Act 2005*.

Part 2A will apply to civil disputes and civil proceedings, other than those expressly excluded and came into force on 1 April 2011 but, subject to transitional provisions, will apply to proceedings commenced after 1 October 2011. Part 2A of the *Civil Procedure Act*:

- Introduces a general requirement to take reasonable pre-litigation steps, for example:
 - (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (b) responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (c) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute,
 - (d) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes,
 - (e) taking part in alternative dispute resolution processes.

- Establishes the framework for the development of specific pre-action protocols by way of rules of the court and/or regulations.

Proceedings commenced in the Supreme Court of New South Wales are currently exempt from the pre-action protocols but it is anticipated that the relevant Regulation to the *Civil Procedure Act* will be repealed in the coming months, so that Supreme Court actions will be caught by the pre-action protocols established in Part 2A of the *Civil Procedure Act*. Bankruptcy and winding up proceedings to enforce collection of debts are excluded proceedings.

Queensland

In Queensland, some types of civil proceedings (personal injury claims) are already governed by pre-action protocols.

The requirement for pre-action protocols for these types of claims is aimed at providing a procedure for the speedy resolution of claims and promoting settlement. Parties are required to disclose information and documents, join any contributors and provide formal notification of claims. A compulsory conference must be held on completion of the pre-action requirements and parties are to exchange final offers at the conclusion of the conference.

We are not aware of any proposals to extend these protocols to other types of civil proceedings at this time. However, given the actions taken in Victoria, NSW and at the Commonwealth level, implementation of pre-action protocols in Queensland could be expected to occur sooner rather than later.

Conclusion

The civil dispute legislation will shift the initial focus of disputes away from the courtroom and towards settlement negotiations and dispute resolution processes **before** commencement of proceedings.

Parties in dispute will need to turn their minds to making genuine attempts at settling the dispute prior to any civil proceedings being initiated. The benefits of doing so could mean that disputes might be resolved earlier and without the burdensome expense of taking a dispute through the court.

What will constitute appropriate genuine steps will turn on the facts of each matter. Parties should seek appropriate legal advice at the commencement of any civil dispute to avoid costs orders being made against them by the court.

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